

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
JAMES D. AND LAWRENCE D. GARVEY)	File No. 20020405AAT
d/b/a RADIOFONE)	
)	
For Authority to Modify Broadband Radio Service)	
Station WLK290, Channel 2, New Orleans,)	
Louisiana)	

ORDER ON RECONSIDERATION

Adopted: December 14, 2006

Released: December 15, 2006

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address the petition for Reconsideration filed on October 22, 2004, by James D. and Lawrence D. Garvey d/b/a Radiofone (Radiofone).¹ Radiofone seeks reconsideration of the September 14, 2004 dismissal by the Wireless Telecommunications Bureau (Bureau) dismissing the captioned application² for Broadband Radio Service (BRS) Station WLK290, New Orleans, Louisiana.³ Radiofone requests that the captioned application be returned to pending status and reinstated *nunc pro tunc*.⁴ For the reasons stated below, we deny the Petition.

II. BACKGROUND

2. On April 5, 2002, Radiofone filed an application to make modifications to Station WLK290, which operates on Channel 2 at New Orleans, Louisiana.⁵ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities.⁶ Among other actions, the Commission instituted geographic area licensing for BRS and EBS. Under geographic area licensing, "BRS and EBS authorization holders will be allowed to place transmitters anywhere within

¹ Petition for Reconsideration (filed Oct. 22, 2004) (Petition).

² File No. 20020405AAT(Application).

³ Letter from Wireless Telecommunications Bureau to Radiofone, Ref. No. 3033482 (Sep. 15, 2004) (Dismissal Letter).

⁴ Petition at 1.

⁵ The Application also sought to increase EIRP greater than 1.5 dB, decrease overall height of the antenna structure, change the emission type, and change antenna pattern. Application.

⁶ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and the Instructional Television Fixed Service the Educational Broadband Service. Because the new rules have taken effect, we will refer to BRS by its new name.

their defined service area without prior authorization so long as the licensee's operations comply with the applicable service rules, do not affect radio-frequency quiet zones, or require environmental review or international coordination."⁷ The Commission also stated, "In light of our decision to institute geographic area licensing for BRS and EBS, we direct the Wireless Telecommunications Bureau to dismiss all pending applications to modify MDS or ITFS stations, except for modification applications that could change an applicant's [protected service area], or applications for facilities that would have to be separately applied for under the rules we adopt today."⁸

3. On September 14, 2004, the Bureau dismissed the Application pursuant to the Commission's directive in the *BRS/EBS R&O*. The dismissal was memorialized in a letter dated September 15, 2004.⁹ On October 22, 2004, Radiofone timely filed the Petition.¹⁰ Radiofone first argues that the dismissal violated the Administrative Procedure Act (APA) because, at the time of the dismissal, the rules adopted in the *BRS/EBS R&O* had not yet been published in the Federal Register or become effective.¹¹ Second, Radiofone argues that the application should not have been dismissed under the criteria suggested by the Commission because the application would change Station WLK290's protected service area.¹² Third, Radiofone suggests that the proposed modifications would require prior Commission approval based on the transition safe harbor provisions contained in Section 27.1232 of the Commission's Rules.¹³ Finally, Radiofone argues that dismissal was erroneous because the Commission had not yet established rules and policies for relocating BRS Channel 2 incumbents.¹⁴

III. DISCUSSION

4. Radiofone's arguments are without merit. With respect to Radiofone's APA arguments, the decision to dismiss unnecessary applications is procedural in nature and therefore not subject to the notice and comment and effective date requirements of the Administrative Procedure Act.¹⁵ In any event, since the rules have now taken effect,¹⁶ we would not reinstate the Application at this time on that basis.

5. Radiofone's argument that the Application could change Station WLK290's protected service area is clearly wrong. The Application did not propose a change in the protected service area.¹⁷ Even had a change been proposed, Radiofone filed the Application on April 5, 2002, but protected service areas were fixed as of September 15, 1995, thereby eliminating the possibility of changes to the protected service area after this date.¹⁸

⁷ *BRS/EBS R&O*, 19 FCC Rcd at 14189-14190 ¶ 54.

⁸ *Id.* at 14191 ¶ 58.

⁹ Dismissal Letter. Public Notice of the dismissal was given on September 22, 2004. See Wireless Telecommunications Bureau Site-By-Site Action, Report No. 1941, *Public Notice* (rel. Sep. 22, 2004) at 7.

¹⁰ Petition.

¹¹ Petition at 2-3.

¹² Petition at 4.

¹³ Petition at 4-5.

¹⁴ Petition at 5.

¹⁵ See 5 U.S.C. §§ 553(b)(A), (d); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir 1963).

¹⁶ 69 Fed. Reg. 72020 (Dec. 10, 2004).

¹⁷ See Application, Response to Section IV, Question 10.

¹⁸ 47 C.F.R. § 21.902(d) (2004).

6. Radiofone's argument that the modification would require separate application to the Commission based upon the safe harbor provisions of Section 27.1232 of the Commission's Rules¹⁹ is erroneous. The safe harbor provisions of Section 27.1232 were designed to give a proponent certainty that if it made certain proposals in connection with transitioning other licensees to the new BRS/EBS band plan, such proposals would be deemed reasonable.²⁰ Nothing in the safe harbors contained in Section 27.1232 of the Commission's Rules addresses the question of when a licensee must file a separate application with the Commission to make modifications to a BRS station. Section 27.1209(b) of the Commission's Rules addresses that issue and provides that licensees may modify their systems so long as the modified system complies with the applicable rules, unless international agreements require coordination, an Environmental Assessment is required, or a facility would affect a radio quiet zone.²¹ Radiofone does not allege that any of the exceptions to geographic area licensing applies in this case.

7. Finally, the fact that, at the time of the Petition, the Commission had not yet established rules and policies for relocating BRS Channel 1 and 2 incumbents is irrelevant to the dismissal of Radiofone's Application. Given that Radiofone had the authority to modify its station without prior Commission approval, the pendency of the proceeding to establish relocation rules and policies provides no basis for processing Radiofone's Application. In any event, the Commission has now established rules and policies for relocating BRS Channel 1 and 2 incumbents.²²

IV. CONCLUSION AND ORDERING CLAUSES

8. None of Radiofone's arguments provides any basis for reinstating its Application. Accordingly, we deny the Petition.

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by James D. and Lawrence D. Garvey d/b/a Radiofone on October 22, 2004 IS DENIED.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

¹⁹ 47 C.F.R. § 27.1232.

²⁰ *BRS/EBS R&O*, 19 FCC Rcd at 14204 ¶ 90.

²¹ 47 C.F.R. § 27.1209(b).

²² Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, *Ninth Report and Order and Order*, 21 FCC Rcd 4473 (2006).